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5 Explaining attrition: investigating and confiscating the profits of organized crime

In this chapter, we provide insight into a common but scarcely researched problem in the process of confiscating criminal earnings: attrition, that is, the gap between estimated criminal profits on the one hand and the actually recovered amount of money on the other.¹²³ We investigate the practice and results of financial investigation and asset recovery in organized crime cases in the Netherlands by using empirical data from the Dutch Organized Crime Monitor, confiscation order court files, and the Central Fine Collection Agency. The data shed light on financial investigation in practice and give a complete picture of the confiscation order court procedures as well as the execution of those orders for 102 convicted offenders - from public prosecutors' claims and rulings of the initial court, the appeal court and the Supreme Court, to what offenders actually pay. The phenomenon of attrition can be explained by several factors, but an important factor turns out to be how 'criminal profit' is defined (determined) in law and practice.

5.1 Introduction

In many countries around the world, 'follow the money' has become a key concept in policy plans against crime. The focus has shifted from investigating, arresting and prosecuting offenders to taking away their money. In order to stimulate the seizure of criminal earnings, legislation has been implemented, specialized organizations have been set up, and available resources have been increased (Bartels, 2010: v; Brå, 2008; Hofmeyr, 2013; Levi, 2013; Vettori, 2006: 113). Several countries amended legislation to further enhance the possibilities for confiscation (Cabana, 2014: 17-18; Freiberg and Fox, 2000: 239-240; Kennedy, 2007: 33-34; Lusty, 2002: 345, 351).

The underlying theory - goals and assumptions - of the follow-the-money approach can be summarized as follows. First, confiscating 'dirty money' deters crime by reducing its

¹²³ A slightly different version of this chapter was earlier published as: Kruisbergen, E.W., Kleemans, E.R. and Kouwenberg R.F. (2016). Explaining attrition: Investigating and confiscating the profits of organized crime. *European Journal of Criminology*, DOI: 10.1177/1477370816633262.

profitability. Second, it prevents crime by diminishing the capacity of offenders to finance any future criminal activity. Third, it reinforces the norm that ‘crime should not pay’. Fourth, it compensates society for the adverse impacts of crime and the costs of fighting it (Bartels, 2010: v; Lusty, 2002: 345; Nelen, 2004).¹²⁴

In recent years, the amount of recovered money has grown considerably, for example in the United Kingdom and the Netherlands (Levi, 2013: 10; Bullock et al., 2009: ii; Openbaar Ministerie, 2014, 2015, 2016). However, although the value of recovered assets is rising, many countries are confronted with the problem of attrition, that is, the gap between estimated criminal profits on the one hand and the actually recovered amount of money on the other. The results are below initial political expectations, for example regarding the number of cases in which asset recovery is applied, the collection of confiscation orders, or the recovered sum in relation to the entire criminal economy (Bullock et al., 2009: ii; Cabana, 2014: 17; Freiberg and Fox, 2000: 253; House of Commons, 2014; Levi, 2013: 3; Nelen, 2004: 520-522; Van Duyne et al., 2014).

5.1.1 Present study: purpose and research questions

Although asset recovery as a tool to fight organized crime has received support as well as criticism, empirical research on the follow-the-money strategy is scarce (Collins and King, 2013; Fleming, 2008: 9, 10, 21; Freiberg and Fox, 2000: 239-242). In this chapter, we contribute to a better understanding of how this strategy operates in practice and provide explanations for the problem of attrition. Using three empirical data sources, we look into the practice and results of financial investigations and asset recovery in organized crime cases in the Netherlands. We focus on organized crime because the financial approach is supposed to be an important tool to fight this type of crime. We address two research questions: (1) How do the investigation and confiscation of criminal profits work out in organized crime cases? (2) What explanations can be offered for the phenomenon of attrition?

In the next section (5.2), we look into prior empirical research. In section 5.3, we explain the data we use. In section 5.4, we explain the institutional framework of ‘follow the money’ in the Netherlands. Subsequently, we present the results and provide empirical insight into financial investigations (section 5.5), confiscation order court procedures (section 5.6), and the collection of confiscation orders in organized crime cases in the Netherlands (section 5.7). In section 5.8, we summarize the empirical results, explore possible implications, and suggest options for further research.

¹²⁴ Furthermore, financial investigations may result in convictions that would not have been achieved otherwise (Brown, 2013).

5.2 Prior research

Debates on criminal law and policy often have a strong normative component. Policymakers, among others, stress the importance of asset recovery as a tool to make sure that crime does not pay; it is supposed to ‘hit them where it hurts most’ (Nelen, 2004). At the same time, this approach is criticized by authors who, for example, suggest that it has unintended consequences and/or argue that asset recovery regimes conflict with judicial standards. However, the empirical foundation of the legislative and academic debate is poor (Collins and King, 2013; Fleming, 2008: 9, 10, 21; Freiberg and Fox, 2000: 239-242). Some earlier, valuable research exists. Fleming (2008), for example, explored the ‘judgment proof status’ of convicts who received a confiscation order, that is, the ratio between the confiscation order as inflicted by the court and the established amount of criminal benefit. He did not look into the actual payment (collection) of the confiscation orders. A more comprehensive picture of attrition in England and Wales is provided by Bullock et al. (2009), who presented a quantitative overview of the confiscation procedure for 3,604 cases. To explore reasons for attrition they also examined a sub-sample of cases in more detail and interviewed practitioners.

Nelen and Sabee (1998) conducted an in-depth evaluation of Dutch confiscation legislation. Besides interviews and analyses of databases focusing on a specific phase of confiscation, they examined 58 appeal court cases for which they had information on all steps from the prosecutor’s claim up to and including the appeal court decision, but excluding the phase of collection of the confiscation order. Meloen et al. (2003) also conducted a thorough study of confiscation in the Netherlands (see also Van Duyne and Levi, 2005). Their study includes information on several phases of the confiscation process, such as estimated criminal benefit during the financial investigation and the amount actually collected, but the underlying databases mostly refer to different sets of cases. More recently, Van Duyne et al. (2014) analysed the database of the Central Fine Collection Agency (CJIB), covering the collection of confiscation orders, but not including the preceding phases of confiscation.¹²⁵

Besides their relatively small number, most of the existing empirical studies do not provide a complete picture for the cases studied, that is, from the investigation of the profits of crime to the actual collection of assets, and/or lack a qualitative insight into the different phases of confiscation. As a result, knowledge of ‘the law in action’ is limited (Vettori, 2006: 20). In this chapter, using three data sources, we look into financial investigation, give a complete picture of the confiscation order court procedures as well as the execution of those orders for 102 convicted offenders, and provide a qualitative explanation of the facts.

¹²⁵ Vrugink interviewed 100 imprisoned convicts who received a confiscation order, to find out how they felt about this measure and whether the confiscation order might have any effect on criminal behaviour.

5.3 Methodology

We focus on financial investigation and confiscation orders applied in organized crime cases. By ‘confiscation order’, we refer to the ‘*ontnemingsmaatregel*’, a measure under Dutch criminal law that can be applied against convicts to take away their criminal profit. We use three sources of empirical data. The first source consists of cases from the Dutch Organized Crime Monitor (DOCM), an ongoing research project into organized crime in the Netherlands (for more information, see Kruisbergen, Van de Bunt et al., 2012).

At the time a case is studied for the DOCM, the court procedures are often not completed, let alone the execution of measures such as confiscation orders. To collect information on confiscation orders applied in cases of the DOCM, we used a second data source: the Central Fine Collection Agency (CJIB), responsible for the execution of sanctions such as fines and confiscation orders. From the 120 cases of the first three DOCM data sweeps,¹²⁶ we retrieved the names as well as date and place of birth of more than 1,600 suspects.¹²⁷ These were sent to the CJIB to be matched with their confiscation database. The matching produced 119 convicts for whom it could be established that their involvement in one of the cases resulted not only in a criminal conviction but also in a confiscation order. The CJIB sent back a database with information on the actual collection of those confiscation orders.

Third, court files were analysed to retrieve information on court procedures preceding the final confiscation order (prosecutor’s claim, district court’s verdict, et cetera), the grounds on which a court decided whether or not to diverge from the prosecutor’s claim (and/or from the decision of lower courts), and the facts and assumptions used to estimate the criminal profit. For 102 convicts the available court files produced information on all phases of the court system: the district court, the appeal court and the Supreme Court (not all cases went to higher courts). For 17 convicts, the information was not complete. The information regarding the remaining 102 confiscation cases was entered into SPSS.

These combined three data sources give insight into the financial investigations in organized crime cases, and give a complete picture of the confiscation order court procedures and the execution of those orders for 102 convicted offenders. The collection of these confiscation orders started between August 1995 and July 2011 (date of intake at the CJIB, median date May 2003). Information on the collection is up to date to 3 July 2015. On that day, the collection of 26 of the 102 confiscation orders was still ongoing.

¹²⁶ Because court procedures as well as execution of confiscation orders can take a long time, the fourth DOCM data sweep was not included.

¹²⁷ The more than 1,600 names include the main suspects, but also suspects who played a more peripheral role. Financial investigations often target only (some of) the main suspects, if there is sufficient evidence of criminal profits and assets.

5.4 Follow the money in the Netherlands: institutional framework

This chapter focuses on the confiscation order. This instrument and the accompanying legislation has received the most attention in the Dutch public debate on asset recovery. The confiscation order is not the only instrument for recovering crime money. A case can be settled out of court when both the prosecutor and the defendant settle for an agreement on an amount of money the defendant is willing to pay. Another instrument is a fine, which in some cases is used for the purpose of confiscation. Furthermore, there is the possibility of seizure and forfeiture of objects that are directly linked to a crime, for example, when offenders involved in underground banking are arrested carrying tens of thousands euros in cash.¹²⁸

The possibility of depriving offenders of illegally obtained profits was introduced in Dutch general criminal law in 1983.¹²⁹ In 1993 new legislation was adopted to increase the statutory powers of law enforcement agencies to take away criminals' money. The new law made it possible for the prosecution, once a defendant had been convicted, not only to claim the confiscation of the earnings resulting from the facts for which he is convicted, but also to claim confiscation of profits in relation to other crimes in which he was plausibly involved. The involvement in these 'other crimes' does not have to be proven to a criminal standard; sufficient indications are adequate. Furthermore, if a defendant is convicted for an offence that falls under the most serious classification of crimes, unexplained wealth suffices to claim confiscation of profits. In that case, the prosecutor does not even have to specify a crime that generated the profit. The political debate on this legislation was inspired by the ideological notion that 'crime should not pay' and causal assumptions such as the view that taking away criminals' money acts as a deterrent and will prevent the financing of future criminal activity (Nelen, 2004: 523-524).

In 2003 and 2011, the legislation was further amended. One of the changes of 2003 concerned the possibility for the prosecution to apply for coercive custody for a maximum of three years if a convict does not pay a confiscation order.¹³⁰ A convict who has served coercive custody still has to pay his confiscation order, which was not the case when an 'unwilling' convict got 'replacement custody', as was the case before 2003. New legislation in 2011 introduced, among others, the possibility to deploy special methods of criminal

¹²⁸ Other instruments are: a *transaction*, stating conditions (for example the payment of a sum of money) under which the right to prosecute the crime that generated the profits is cancelled (an *agreement* cancels only the confiscation procedure), *compensation for victims*, and *fiscal measures* (Nelen, 2004: 517-520).

¹²⁹ The possibility of depriving offenders of illegally obtained profits had already been introduced in Dutch economic criminal law in the 1940s (Borgers, 2001: 51-67).

¹³⁰ Complete reference in Dutch: Wet van 8 mei 2003 tot wijziging en aanvulling van een aantal bepalingen in het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten met betrekking tot de ontneming van wederrechtelijk verkregen voordeel (*aanpassing ontnemingswetgeving*), *Stb.* 2003, no. 202.

investigation, such as wiretapping, for the purpose of executing a confiscation order.¹³¹ Also the budget available for the prosecution service to take away criminals' money increased in 2011 as well as in 2013 (Borgers, 2001: 270-272; Nelen, 2004: 517-520; Van Duyne et al., 2014).¹³²

In order to claim a confiscation order, the volume of criminal profits has to be determined by means of financial investigation, for which specialized but also regular investigative teams are used. The ultimate responsibility for the financial investigation rests with the public prosecutor.

As was explained earlier, involvement in the crimes generating profits does not have to be proven by regular standards of criminal law. The estimation of the profit itself is also subjected to a lower standard of proof than is upheld in regular criminal law cases; one piece of evidence can be a sufficient base for the estimation (Borgers, 2001: 268-270).

The law gives no definition of 'criminal profit', nor does it prescribe how criminal profit should be determined. Costs directly linked to the criminal activities under consideration may be deducted, but this is not mandatory, and a court may decide to moderate a confiscation order. What is clear from the legislative debate and rulings of the Supreme Court, though, is that the concept of 'profit' is to be understood in a broad sense. It also includes saved expenses and it is not relevant, in principle, whether or not the money is spent, for example on other criminal activities or on luxury items, or even lost, such as when a jewel thief gets robbed before he can sell his loot. What matters is the (initial) profit itself; the jewel thief has to pay the value of the items he stole (their worth on the black market), regardless of the fact he never made any money on them (Borgers and Simmelink, 2005a).

Once a person has been convicted of a crime, the prosecution service has to start a separate procedure to claim a confiscation order. A court decides on this claim, after which both the convict and the prosecution can go to the appeal court (and ultimately to the Supreme Court). Once a confiscation order is final, the case is transferred to CJIB for execution.

¹³¹ Complete reference in Dutch: Wet van 31 maart 2011 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten ter verbetering van de toepassing van de maatregel ter ontneming van wederrechtelijk verkregen voordeel (*verruiming mogelijkheden voordeelontneming*), *Stb.* 2011, no. 171.

¹³² In 2014 and 2015 new changes in the law came into force. Since 2015, the confiscation law contains a section that stipulates that judges can deduct costs directly linked to the criminal activities under consideration. This is in line with legal practice before this amendment came into force. However, as is clear from the explanatory memorandum, the amendment is intended to limit the actual deduction of costs (complete reference in Dutch: Wet van 19 november 2014 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en de Wet op de economische delicten met het oog op het vergroten van de mogelijkheden tot opsporing, vervolging, alsmede het voorkomen van financieel-economische criminaliteit (*verruiming mogelijkheden bestrijding financieel-economische criminaliteit*), *Stb.* 2014, no. 445; see chapter 6).

In some jurisdictions, certain ‘incentivisation schemes’ and/or targets are used to stimulate the motivation of the organizations involved in asset recovery. In the United Kingdom and the United States, for example, part of the value of seized assets is given to the law enforcement body responsible for the seizure (Baicker and Jacobson, 2007; Levi, 2013: 10).¹³³ Such incentives are lacking in the Netherlands. However, targets are to be achieved, or at least clearly defined objectives: the increase in the amount of recovered money should be three times greater than the additional investment in financial investigations (Government of the Netherlands, n.d.: 2).

5.5 Financial investigation: finding clues, or not

A confiscation order is based on an assessment of the profits of crime. Such an assessment is hindered by the fact that criminals try to hide their assets, which limits the amount of available information. In so far as the earnings are consumed, for example spent on daily expenses, this may also be hard to trace. Below we look into different types of information that can be found during a financial investigation. In particular, we explore how certain characteristics of offenders and the criminal operations they engage in relate to the amount and type of information that investigators may find. Four factors appear to be relevant: offenders’ and witnesses’ behaviour, the logistics and scale of criminal operations, the use of legal economic infrastructure, and operational necessities that may force offenders to expose themselves.¹³⁴

Offenders, co-offenders and witnesses: vigilance and willingness to talk

Offenders differ: not all have the same degree of vigilance and discipline. Vigilance and discipline are needed, for example, to avoid communicating any concrete information regarding quantities or prices over the phone, to withstand the temptation to enjoy criminal earnings all too openly, and to make sure that the police will not find any notes or records. Although this may be pretty obvious, in daily reality it may prove quite difficult to uphold these standards, even for high-level, very experienced offenders, as is clear from the following example.

The criminal network surrounding T is involved in large-scale, international drug trafficking. During a raid the police seize a money counting machine, many hundreds of kilos of hashish, tens of kilos of amphetamines, tens of cell phones, and encoded bookkeeping. In the bookkeeping, codes are

¹³³ The United States is the ‘global leader’ in aggressive asset forfeiture (Levi, 2013: 9). The U.S. confiscation regime includes civil as well as criminal recovery procedures. Furthermore, in many jurisdictions police agencies are allowed to keep a substantial fraction of the seized assets (Baicker and Jacobson, 2007; Worrall and Kovandzic, 2008).

¹³⁴ It is not meant as an extensive overview.

used to represent different types of drugs, currency, and customers. Labels with the same codes are found on the cell phones. T is very much aware of potential police activity, as he uses only codes and uses a different cell phone for each 'business' contact. However, he could not prevent the police finding not only the encoded bookkeeping but also a document explaining the codes. Working through the decoded records, the police established that the turnover in 18 months was more than €15,000,000 (case 122).¹³⁵

Although many co-offenders hide behind a 'wall of silence', some of them may be found willing to make statements. An offender, once arrested and on trial, may find it quite rational to give at least some information about his assets. This was the case, for example, during the court proceedings of a drug trafficker, who claimed that only €50,000 of the seized €1,000,000 in cash belonged to him (case 47). Even a suspect's statement that involves information regarding only his own earnings may prove useful to assess other suspects' earnings. In a cocaine trafficking case, the court used the amount of earnings suspect A admitted to have gained to determine the criminal earnings of suspect B, who was assumed to hold an equal position within the criminal group (case 102).

Besides (co-)offenders themselves, there may be informers who participate in the same criminal market as the offender and who are willing to provide information, out of envy, revenge, or simply because they want to eliminate a competitor (Billingsley et al., 2001b; Van Duyne et al., 2001: 150).

In some cases, depending on the nature of the criminal activities, there are victims who could provide information on criminal earnings, which brings us to the second factor.

The nature, logistics and scale of criminal operations

Because of their consensual nature, crimes such as drug trafficking do not often produce victim reports. Non-consensual crimes such as human trafficking and extortion do (in some cases) produce victim reports, including information on, for example, how much money a trafficked prostitute was forced to hand over to her pimp.

Furthermore, the scale and logistics of the criminal business process influence whether or not certain types of information are found. It is very hard to engage in complex criminal operations, such as large-scale drug trafficking, for example, without any form of administration. 'T' in the previous example was active on several links of the business process that constitutes international drug trafficking: production/supply, transport and sales. For each link, he had to manage and keep track of contacts, financial transactions and agreements, often with different partners. Beyond a certain scale and complexity of

¹³⁵ In the case examples used in this chapter, all initials and numbers have been adjusted to make the people involved less easily identifiable.

operations, human memory alone is simply not adequate. Therefore, some bookkeeping is found in several cases of, for example, drug trafficking and underground banking. Although in many cases the 'bookkeeping' consists of nothing more than notes on a piece of paper, once found it can prove very helpful in creating a picture of the (financial scope of) criminal activities.

Use of legal economic infrastructure

The legal economic infrastructure provides criminals with all sort of opportunities but using them is not without risks. In several fraud cases, the use of legal companies forms an essential part of the modus operandi. In case 142, for example, offenders use an investment company to attract money from unsuspecting customers who are tempted to participate in a promising investment project that, in fact, is nothing more than a scam. To funnel the money away, the offenders use other legal enterprises. However, precisely because these criminals use legal companies, their activities leave traces that helped to reconstruct the money trail.

In other cases, offenders turn to legal enterprises to buy chemicals or pharmaceuticals needed for producing or adulterating drugs. In some cases, the records of the sales kept by these legal enterprises are used by the police to calculate the size of the criminals' turnover.

Overtness as an operational necessity

Operational circumstances may tempt even a vigilant offender to be more overt than he would want to be. Owing to the unregulated and hostile environment in which an offender operates, a lot can go wrong during a criminal transaction; for example, there is the constant risk of seizure, business partners may prove to be unfaithful, or partners simply misunderstand each other. Since the easiest and fastest way to solve operational problems is to contact partners directly, misunderstandings and unexpected obstacles may lead to an increase in communication (Kleemans et al., 2002: 55-56). This is illustrated by the following case. During a transaction, the amount of cocaine delivered turns out to be smaller than agreed. To solve the confusion, offenders call each other (numbers represent kilos of cocaine).

C: 'There has been a miscalculation. It will be 150 and 380; not 160 ...'

K: 'So 530 and not 540.'

C: 'Make a calculation and call me.'

K: 'OK.' ...

C: '... They say it's 530 and E says it's 540. I have to find out what causes the confusion.' [Meanwhile E calls K and asks if he can come over. Later K calls B and puts E on the line] ...

B: 'OK. How much was dropped off? Because yesterday I also talked to them about ... 530 or 540.'

E: 'No, it was 530.'

B: '530? Yes, OK, ...' (case 124).

Various types of information produced by the investigative efforts of the police (and other parties) are used by the public prosecutor to build his confiscation case. Since in many cases factual information is far from complete, the estimation of criminal profits is based in part on extrapolations and assumptions. Ultimately it is up to the court to decide if and to what extent it goes along with the prosecutor's estimation as well as the underlying facts, extrapolations and assumptions.

5.6 Court procedures: from public prosecutor's claim to Supreme Court

Table 1 shows the complete court procedures of 102 confiscation order cases. Attrition takes place in all phases of the court procedure. For the 102 cases, the initial public prosecutor's claims total €61,928,210. The decisions of the district court in these cases result in confiscation orders totalling €46,352,957, which reduces further to €30,471,637 after 63 cases have gone to the appeal court, and ultimately to €27,463,899, due to the outcome of 34 cases that also went to the Supreme Court. So, from the convicts' point of view, it 'pays' to appeal. In total, the final confiscation orders in the 102 cases amount to less than half of the initial claims.

Looking at individual cases, it turns out that 82 cases result in a final confiscation order that is lower than the initial claim. In 19 cases, the confiscation order equals the initial claim, and only 1 case shows a confiscation order with a higher amount than initially claimed. Attrition during the court procedures consists of three main elements, which will be discussed below.

Table 1. Confiscating the profits of organized crime of 102 convicted offenders:
Court procedures (in euros).

	District court		Appeal court		Supreme	Final
	Public prosecutor's	Court's	Public	Court's	Court	confiscation order
	claim	order	prosecutor's	order		
			claim			
Court procedures						
DC (N = 39)	4,703,962	2,185,719	-	(2,185,719)	(2,185,719)	2,185,719
DC+AC (N = 29)	22,309,844	17,183,864	12,113,334	8,649,631	(8,649,631)	8,649,631
DC+AC+SC (N = 34)	34,914,404	26,983,374	32,862,352	19,636,287	16,628,549	16,628,549
Total (N = 102)	61,928,210	46,352,957		30,471,637	27,463,899	27,463,899

Note: DC = district court, AC = appeal court, SC = Supreme Court.

5.6.1 Court procedures: determining the amount of criminal profit

Determining the profits of crime is more complex than follow-the-money rhetoric implies. Measuring revenues of hidden activities is difficult. Since factual information is limited, a public prosecutor has to rely on extrapolations and assumptions. Furthermore, how the amount of criminal profit should be established is not subject to strict definitions. So, different actors may use different methods and assumptions in their estimations (see also Bullock, 2014: 59-61). This produces a huge potential for disagreement, and this is exactly what becomes evident in our research. The investigated cases show a lot of disagreement - or different views - on what an offender made from his crimes. This disagreement may occur between the public prosecutor and the court, between the district court and the appeal court, or within the prosecution service itself.

In 77 of 83 cases in which the final recovery order diverges from the initial claim, court files provide information on the criminal profit as determined by the court. In 75 of those 77 cases the court disagreed with the criminal profit as estimated by the public prosecutor (in several cases the court also had other reasons to diverge from the prosecutor's claim; see following sections) (see also Meloen et al., 2003: 14, 171; Vrugink, 2001: 85).

In several cases, the court refuses to include profits made from criminal activities of which the defendant is not convicted and/or profits that, according to the court, are not based on solid and verifiable arguments. The case below is an example.

G operates as the supplier in an international XTC-trafficking network. The public prosecutor puts a claim to the district court for a confiscation order of more than €1,700,000. The district court decides that a much smaller amount is appropriate, €123,000. The main reason is that the district court does not take into account two XTC transports for which G was not convicted but for which the prosecutor claimed there were sufficient indicators for his involvement. For the appeal court, the prosecutor claims a confiscation order of less than €320,000. However, in its estimation of the criminal profit G made, the appeal court includes even fewer XTC transports than the district court did, and it issues an order of less than €100,000, which, three years after the case has been transferred to CJIB for execution, G has paid (case 89).

In the following case, the appeal court disagrees with the prosecutor not so much on specific transactions, but rather on the average intensity of drug trafficking operations. Besides that, the appeal court also applied a reduction to the confiscation order.

The appeal court calculates the criminal profit of F, a key player in a drug trafficking network, to be €584,000, almost €250,000 less than the calculation of the public prosecutor. Compared to the prosecutor, the appeal court assumes that the drug trade was less intensive - 4 kilos of cocaine per month instead of 6 - because F was imprisoned during a specific period, he intended to 'lie low' for a while, and because a fellow offender's death decreased trading opportunities. Furthermore, the court deducts €420,000 due to personal circumstances, as F is on welfare and under treatment for drug abuse. The final order boils down to €164,000, of which 11 years later F has paid less than €60,000 (case 17).

In several cases, it is not the criminal activities (alone) that are disputed, but (also) the net profits. This may concern criminal 'business costs'. Although judicial practice is rather strict regarding the deduction of costs, in some cases the court deducts more business costs than the prosecutor allows for in his estimation. This is the case, for example, in case 97, in which the prosecutor did not deduct the cost price of cocaine but the appeal court did. A dispute over the net profits may also concern the share of the estimated total profit ascribed to a convict. A court may conclude, for example, that net profits are smaller because it splits the total criminal profit among co-offenders or because it decides that the convict played a smaller part than the prosecutor assumed.

P is the main offender in an extortion case. The public prosecutor puts a claim to the district court for a confiscation order of €1,974,000. The district court decides that confiscation should amount to €1,709,000, which equals the claim of the public prosecutor for the appeal court. The appeal court, however, issues a confiscation order of €965,000. Most of the difference is explained by the fact that the appeal court assumes that more than €630,000 of the extortion scheme was received by somebody other than P. More than five years after the execution of the order started, P has paid €52,000 (case 120).

As we have said, disagreement on the estimation of criminal profit not only occurs between court and prosecution, but also within the prosecution service. This may concern a difference between the prosecutor in the appeal phase and the prosecutor who brought the case to the district court. It also happens, however, that within one and the same phase the prosecutor changes his initial claim. Court files indicated that the latter occurred in at least 23 cases.¹³⁶

The existence of diverging views is not a bad thing in itself. It is the reason a constitutional state provides the possibility to go to the appeal court. However, the level of disagreement does show that, at least in our sample, it is not quite clear how ‘criminal profit’ should be determined; what should and should not be understood as criminal profit, what information should be used to measure it, and how should different sources of information be weighted?

5.6.2 Court procedures: lengthy procedures

Another reason for attrition during the confiscation order procedure concerns reductions in the amount of the confiscation order due to violations of Article 6 of the European Convention on Human Rights (ECHR). In 21 of the 102 cases, the court decided that the confiscation court procedure exceeded the ‘reasonable time’ within which trials should take place according to the ECHR. As a result, the court applied a reduction to the confiscation order, varying from less than 1 percent up to 50 percent ($N = 20$, missing data for one case).

Since the confiscation procedure is separated from the criminal law case, and both types of cases include the possibility to go to the appeal court and the Supreme Court, getting a final court decision on confiscation indeed takes time (see also Van Duyne et al., 2014; Vettori, 2006: 115). For half of the cases in our sample it takes at least 2.5 years to get from a decision of the district court in the criminal law case to a final confiscation order that is transferred to CJIB for execution; in a quarter of the cases it takes more than 4.5 years

¹³⁶ The actual number of cases in which the prosecutor changed his claim could be greater, since court files may not always include information on this matter.

($N = 82$, missing data for 20 cases). Looking at the data, there seem to be some incentives for offenders to extend the court procedure: an appeal, at least in our sample, is likely to result in a lower confiscation order, and, as we just noted, beyond a certain point protracted procedures may result in a reduction.

5.6.3 Court procedures: taking into account the convict's financial capacity

Finally, in nine cases the court decides to apply a reduction because of the limited financial capacity or other personal circumstances of the convict (for example case 17, as illustrated in a previous section). The reduction varies from 13 percent to 83 percent of the estimated criminal profit. Although the court applies a reduction in nine cases, more often requests for a reduction on grounds of insufficient financial capacity are rejected by the courts.¹³⁷

5.7 The collection of confiscation orders: What do they actually pay?

After both the conviction in the underlying criminal law case and the court's decision regarding the confiscation order have become final, the confiscation order is transferred to CJIB for execution. To what extent are the final confiscation orders actually paid? Figure 1 provides the complete picture, from the prosecutor's claim up to and including the collection of confiscation orders. The information is up to date to 3 July 2015. On that day, 76 cases were considered as closed; in 26 cases the collection was still ongoing.

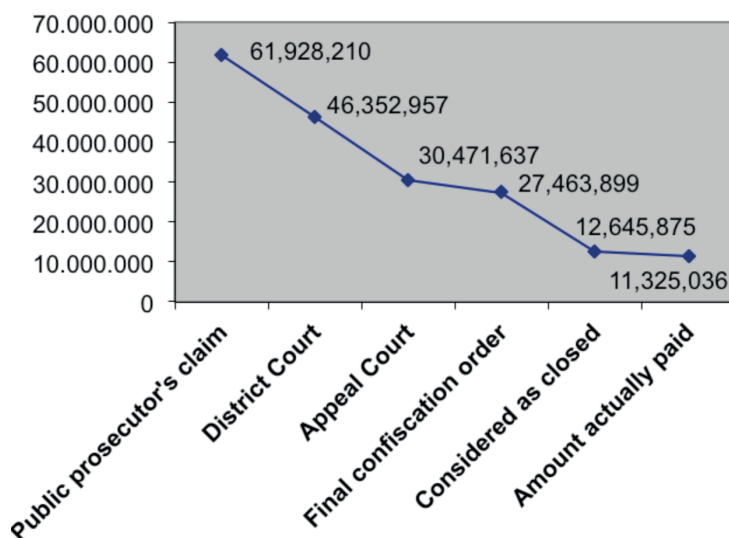
The average amount of the final confiscation order in our sample is €269,254; with a minimum of less than €100 and a maximum of more than €6,000,000. The distribution is very skewed: there are relatively many 'small' and few 'large' confiscation orders (see also Bullock et al., 2009: 7-9; Fleming, 2008: 75, 78; Van Duyne et al., 2014). Half of the confiscation orders amount to less than €35,000 and a quarter exceed €100,000. The final confiscation orders total €27,463,899. Up to 3 July 2015, €11,325,036 has been paid, which represents 41 percent.¹³⁸ Before we look into the factors causing attrition during the collection of confiscation orders, it should be mentioned that, since the collection has not yet come to an end in 26 cases, eventually the percentage of the confiscation amount actually paid can and probably will go up. However, there are two reasons why expectations of this potential increase should be tempered. First, the collection of those confiscation

¹³⁷ The overview of reasons for attrition during the court procedures includes the most prominent results of our analyses of the court files, but it is not extensive. Furthermore, some court files did not include adequate information on the court's motivation.

¹³⁸ The payment rate decreases as the value of confiscation orders increases. For cases in which the order amount is lower than €15,000, 83 percent of the total sum is paid ($N = 28$). For cases with an order value of €15,000-35,000, €35,000-100,000, and >€100,000, the percentage drops to 78 percent ($N = 24$), 64 percent ($N = 25$), and 39 percent ($N = 25$) respectively (see also Bullock et al., 2009: 9-12).

orders has already been running for many years (median = 8 years) Second, if we look at cases that were transferred to CJIB for collection a long time ago, collection results do not improve dramatically. The collection percentage for all 102 cases together is 41 percent. For cases with a potential collection period of at least 7 years, the percentage is 38 percent ($N = 88$), whereas it is 52 percent ($N = 60$) for cases with a potential collection period of at least 11 years. This percentage is the same (52 percent) for cases with a potential collection period of at least 14 years ($N = 38$).

Figure 1. Confiscating the profits of organized crime of 102 convicted offenders: from public prosecutor's claim to collection.



5.7.1 Legal reasons to stop collection without (full) payment

In 19 cases, there were legal reasons to stop collection without (full) payment. In nine cases, the court allowed for the (partial) remission of the imposed confiscation order, particularly when life circumstances of the convict worsened. Eight convicts who did not pay got 'replacement custody'.¹³⁹ Furthermore, collection was precluded by reason of the lapse of time in three cases, two convicts had died before the confiscation order was fully paid, and in two cases there were 'other' reasons. Together these reasons account for €1,320,839 that was considered as 'closed' although it was not paid. So there must be other and more important reasons why €16,138,863 (59 percent of the total sum of the final

¹³⁹ Replacement custody is only possible if the confiscation order became irrevocable before 1 September 2003.

confiscation orders) remains unpaid (until now). Those other reasons boil down to convicts successfully hiding their assets from law enforcement agencies and/or convicts who are simply unable to pay. Looking at the legislation and the court procedures, as well as the literature on organized crime and financial investigation, these two main reasons can be specified as follows.

5.7.2 Convict is unwilling to pay and succeeds in hiding his assets

A very simple reason money is not collected boils down to convicts covering their assets and law enforcement agencies failing to trace those assets. The police might have good reasons to believe that an offender has assets, but there may be no actual signs of them (Bullock et al., 2009: 14-19; Fleming, 2008: 86-89). Furthermore, law enforcement agencies are hindered by the fact that part of an offender's assets are located abroad. Our analysis of the assets of organized crime offenders in the Netherlands has shown that more than one-third of the real estate and companies owned by them was located in a foreign country, for example in their country of origin (chapter 4). Investigating and especially confiscating the profits of crime within a country is difficult as it is; cross-border confiscation is even more difficult (Brown and Gillespie, 2015; Cabana, 2014: 19-21; Levi, 2013: 1).

Whether nationally or internationally, it all comes down to the police and other law enforcement officers focusing on 'following the money'. As Van Duyne et al. (2001: 89-94) argue, a financial investigation is partially a mental attitude, a way of looking at things that can be integrated into the daily routines of police work. Bullock (2010: 8, 12, 13) found that financial investigations have not yet become an established part of daily policing in England and Wales. Vettori reached comparable conclusions in an EU-wide study (Vettori, 2006). Similar results were found by the Swedish National Council for Crime Prevention (Brå, 2008: 23) and, for the Netherlands, by Meloen et al. (2003: 23-24) and the Inspectie Openbare Orde en Veiligheid (2012: 10). Although the Dutch Court of Audit (2014: 6-8) concluded that capacity and expertise have improved since 2008, it is clear from the literature that the greater emphasis policymakers put on financial investigations does not automatically and immediately produce results in investigative practice.

5.7.3 The convict is unable to pay

Another part of the attrition is probably not a consequence of unwillingness to pay or any failings during the phases of investigation and collection, but rather a consequence of how criminal profits are defined in law and judicial practice (see also Bullock et al., 2009: 14-19; see also Vrugink, 2001). Costs, as mentioned before, are only deductible if they are directly linked to the criminal acts that generated the profit under consideration. In practice, this means that costs an offender paid when pursuing transaction B can be ignored when deciding on a confiscation order that concerns only transaction A. In case 47, for example, the appeal court decided that the cost price of 130,000 pills that were seized

before the offender could sell them should not be deducted since the confiscation order concerned only other, successful, sells. Whether or not the money has been spent is also not taken into account when criminal profit is estimated. Earlier studies show that a part of the money offenders make is spent on an exuberant consumption pattern, that is, nightlife, cars, jewellery, clothing, holidays, et cetera (for example, Fernández Steinko, 2012; Levi, 2012: 610; see also chapter 4). These expenditures are ignored, as are others. If an offender has given some of his money away, this does not change the fact that the money was made through crime, and so the offender should pay it ‘back’ to the state, as was decided by the appeal court in case 86. Nor is it taken into account if the money has been spent or lost on other criminal activities, as is illustrated by the following case.

Several offenders reinvest their earnings in counterfeited clothing. The clothing, however, is seized. The appeal court decides that the money the offenders invested should not be deducted from the criminal profit. If you reinvest in criminal activities, the appeal court argues, you deliberately take the risk of seizure. The seizure of the clothing does not change the fact that the money the offenders invested concerns profit of prior criminal activities (case 68).

So what counts for the determination of the confiscation amount is the initial profit a convict made. Whether or not the money is spent on consumption or reinvestments may be ignored, as may any losses made in prior criminal activities. Some would say that this is in line with the basic thought that a criminal should not be allowed to enjoy any benefits from his deeds. It also means, however, that a part of the ‘criminal profits’ might never be recovered.¹⁴⁰

5.8 Conclusion and discussion

5.8.1 Empirical results

This chapter gives empirical insight into financial investigations and asset recovery in organized crime cases in the Netherlands. We explored how certain characteristics of offenders and the criminal operations they engage in relate to the amount and type of information that investigators may find. Four factors appear to be relevant: offenders’ and witnesses’ behaviour, the logistics and scale of criminal operations, the use of legal economic infrastructure, and operational necessities that may force offenders to expose themselves.

¹⁴⁰ In the U.K. post-conviction confiscation regime, a distinction is made between ‘criminal benefit’, that is, the amount a defendant is adjudged to have made from criminal activities, and the ‘available amount’, that is, the amount that the state deems to be actually available for confiscation. However, this does not mean that the collection of confiscation orders in the United Kingdom is free from attrition (Bullock, 2014; Bullock et al., 2009).

The information produced by investigative efforts of law enforcement agencies is used by the public prosecutor to build a confiscation case. We gave a complete picture of the confiscation order court procedures as well as the collection of those orders for 102 convicted offenders. Attrition takes place in all phases. For 102 cases, the initial public prosecutor's claims total €61,928,210. At the end of the court procedure, this is reduced to €27,463,899 (44 percent), of which €11,325,036 (41 percent) is paid (July 2015).

5.8.2 Explaining attrition

Summing up, attrition is substantial, both during the court procedures and during the collection of confiscation orders. Our results indicate that a fundamental factor causing attrition during the court procedures concerns the lack of clarity surrounding the determination of 'criminal profit'. The legislator created a lot of room for discretion, as there is no strict definition of 'criminal profit', nor of how it should be estimated. Combined with the fact that solid data on criminal earnings are by definition limited, this creates a huge potential for different views on actual criminal profits. At least in our sample, this potential is fully realized. In a majority of cases, the court does not agree with the criminal profit estimated by the prosecutor and decides that a (much) smaller confiscation sum is appropriate. How 'criminal profit' is defined in law and judicial practice probably also plays an important role as regards attrition taking place during the collection of confiscation orders. Spending behaviour and losses during criminal transactions are partially ignored when estimating the amount of money an offender should pay. Ignoring expenditures and losses may be well justified given the ideological position that 'crime should not pay'. However, it also increases the chance that offenders are simply not able to pay the confiscation amount in full.

Another factor causing attrition boils down to a problem that all follow-the-money initiatives suffer from: sensible offenders hide their assets and law enforcement agencies do not succeed in tracing them all. Tracing and seizing assets is further complicated by the fact that part of offenders' assets are located abroad.

Furthermore, confiscation procedures take a lot of time. In some cases, the court applies a reduction to the confiscation order because the procedure exceeded the 'reasonable time' within which trials should take place.

Finally, in some cases, the court decided that the financial capacity of the convict justified a lower confiscation amount, or there were legal reasons to stop collection before a confiscation order was paid in full.

5.8.3 Implications

Our sample consists of 102 cases of organized crime with a confiscation order. We do not know whether or not these cases are representative of all cases of organized crime in which confiscation orders were used (see chapter 6). Furthermore, the sample does

not include cases in which financial investigation failed to sustain an application for a confiscation order. However, this chapter represents one of the few studies that empirically examines both financial investigations and confiscation order court procedures as well as the collection of those confiscation orders. Because of the scope of the study as well as the qualitative interpretation of the numbers we delivered, the study contributes to bridging the knowledge gap concerning the practice and results of ‘follow the money’.

Our results show that how ‘criminal profit’ is determined in law and practice is probably an important cause for attrition. This emphasizes the need for more insight into ‘the law in action’. More empirical knowledge should enhance the legislative debate on the content as well as the necessity and usefulness of new legislation. It should also help to have a kind of ‘reality check’ of the high expectations that are prominent in the debate. Advocates of ‘follow the money’ often emphasize that financial investigations ‘pay for themselves’, and more. Whether this is the case is questionable, as research in the United Kingdom indicates (Bullock, 2014: 63; Collins and King, 2013; Levi, 2013: 10; Sproat, 2009).

The value of financial investigations, in a broad sense, should be one of the topics of interest for further research. A financial investigation is much more than a means to recover assets. It can, among others, help identify new suspects, provide information on suspects’ movements, and give new insights into the role of different suspects (Brown et al., 2012: 5-9; Levi, 2013). If, to what extent, and how this potential is realized are some of the questions that need to be addressed.

As far as asset recovery itself is concerned, policymakers, as well as researchers, should recognize the distinction between measures and sanctions such as confiscation orders, fines, settlements out of court, and cash seizures. Their applicability as well as their possible costs and benefits differ. Our study focused on confiscation orders. Confiscation procedures are complicated and an ‘uphill battle’. The fact that confiscation orders are not paid in full does not mean that they - let alone other measures - are not worthwhile. It is possible that the various policy measures, although the implementation is far from perfect, have some of the intended deterrent and preventive effects. The money that is taken away from offenders should at least have some impact on them. Further research should focus on the effects of different sanctions and measures (see also Collins and King, 2013; House of Commons, 2014: 11; Sproat, 2007: 183-184). How are offenders, the level and type of the criminal activities they engage in, and their modus operandi affected? Quantitative recidivism research as well as qualitative case studies (studying police files and interviewing offenders) could shed some light on these matters (e.g. Vrugink, 2001).¹⁴¹ Furthermore, our results indicate that further research should be done

¹⁴¹ Vrugink concluded from interviews with 100 imprisoned convicts (most of whom were convicted for drug trafficking, burglary and robbery) that the confiscation order has no significant influence on the decision to commit crimes (2001: 151).

on the implementation of confiscation legislation. More insight into the decision making and problems that occur during the collection of confiscation orders, for example, should enhance our understanding of the results and could point to possibilities to improve them.

Policymakers are very productive where it concerns new legislation to enhance the possibilities for asset recovery. Debates concerning these reforms are often inspired by ideological standpoints, such as the notion that 'crime should not pay'. Our results show that determining the profits of crime is more complex than rhetoric might imply. Furthermore, recovering the profits that criminals are adjudged to have made proves to be very hard. It is not a bad thing if decision making in the political arena is based (in part) on ideology. However, legislative debates should be fuelled more by pragmatism and - above all - insight into the 'law in action'. A better understanding of how, against whom, and with what results different follow-the-money measures are applied might help to choose the 'right' objectives and priorities. It might also help to improve - or prevent - further legislative initiatives.